

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

778

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 23,643

FRANK X. GROSSI, JR. ON
BEHALF OF AND AS NEXT
FRIEND OF FRANK X. GROSSI,
III, AND GINA X. GROSSI,

Appellant,

v.

PRESIDENT AND DIRECTORS OF
GEORGETOWN COLLEGE, A CORPORATION
JIEH CHYOU YANG, M.D.
JOSEPH R. WILSON, M.D.
JOHN W. WALSH, M.D.,

Appellees.

On Appeal from Decision and
Order of the United States
District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 24 1969

Nathan J. Paulson
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(i)

Table of Contents

	<u>Page</u>
STATEMENT OF THE ISSUE.	1
REFERENCES TO RULING.	2
STATEMENT OF THE CASE.	2
Preliminary Statement.	2
Statement of Facts	3
ARGUMENT.	4
I Plaintiff has stated a valid action in contract.	4
II Plaintiff should be entitled to recover in tort.	8
CONCLUSION.	12

(ii)

Table of Citations

<u>Cases</u>	<u>Page</u>
Carr v. Shifflett, 65 App. D.C. 268	6
* Cayton v. English, 57 App. D.C. 324	6
* Crumady v. The J.H. Fisser, 358 U.S. 423	5, 7
Daily v. Parker, 152 F.2d 174	8
Dini v. Naiditch, 20 Ill.2d 406	9
Hankerson v. Thomas, 148 A.2d 583	10
Hill v. Sibley Memorial Hospital, 108 F. Supp. 739	8, 11
Hitafter v. Argonne Co., 87 App. D.C. 57	9, 10
Montgomery v. Stephan, 359 Mich. 33	9
Morrow v. Yannantuono, 273 N.Y.S. 912	8
Napier v. Greensweig, 256 F. 196	5
Pleasant v. Washington Sand & Gravel Co., 104 App. D.C. 374	8
Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362	7
* Ryan Stevedoring Co. v. Pan-Atlantic SS Corp., 350 U.S. 124	5
Swartz v. Brown, 64 A.2d 298	7
* Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563	5
Yonner v. Adams, 3 Storey, Del. 229	9

* Cases or authorities chiefly relied upon are marked by asterisks.

(iii)

<u>Other Authorities</u>	<u>Page</u>
* Prosser, <u>The Law of Torts</u> , (3d Ed. 1969)	9, 11
Restatement, Law of Contracts	7
2 Williston, <u>Contracts</u> (3d Ed. 1959)	7

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Joseph R. Wilson, M.D.
John W. Walsh, M.D.,
Appellees

BRIEF FOR APPELLANT

STATEMENT OF THE ISSUE

Whether minor children, Frank X. Grossi, III and
Gina X. Grossi, bringing this action through their next
friend for damages which they have suffered as a result of
injuries negligently inflicted on their mother, in the course
of delivery of the second child, have stated a cause of

action, either in contract or in tort, upon which relief can be granted. (This case has not previously been before this Court.)

REFERENCES TO RULING

The court below at the oral hearing on defendants' motion to dismiss set forth the basis of the order from which this appeal is taken (see pages A-8 and A-9 of the Appendix for the pertinent portion of the Official Transcript of the Hearing held September 3, 1969).

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff, Frank X. Grossi, Jr., brought this action as next friend of and on behalf of his minor children to recover damages suffered by the children as a result of defendants' negligent treatment of their mother, Betty M. Grossi, while she was a patient at Georgetown University Hospital. This appeal arose as a result of the granting by the United States District Court for the District of Columbia of defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

Separate actions arising out of the same incident have been brought by Frank and Betty Grossi against these

same defendants. These actions are presently pending in the United States District Court for the District of Columbia.

B. Statement of the Facts

Defendant President and Directors of Georgetown College is a corporation which owns and operates Georgetown University Hospital and employs defendants Jieh Chyou Yang, M.D., and Joseph R. Wilson, M.D.. (Complaint, para. 2, page A-2). Service upon John W. Walsh, M.D. was not completed at the time of dismissal. Accordingly, Dr. Walsh is not a party to this action or to this appeal. ^{1/} Frank X. Grossi, Jr., and Betty M. Grossi are husband and wife and have two children, Frank X. Grossi, III, age four, and Gina X. Grossi, who was born at the time of the incident which is the subject of this action. (Complaint, para. 1, page A-2).

On August 7, 1968, Betty M. Grossi was admitted to Georgetown University Hospital to undergo the routine delivery of a baby after a normal gestation. The delivery was to be compensated for by Frank and Betty Grossi. (Complaint, para. 3, page A-2)

In the pre-delivery preparation, a local anesthetic was prescribed by the attending physician, John W. Walsh, M.D..

^{1/} Copies of pleadings and briefs in this appeal have been served upon Dr. Walsh by mail.

(Complaint, para. 6, page A-3). This anesthetic, known as an epidural or extradural, was administered by defendant anesthesiologists Jieh Chyou Yang, M.D., and Joseph R. Wilson, M.D. who were employed by and who were acting under the supervision and control of defendant corporation. (Complaint, para. 6, page A-3). Plaintiff alleges that in the course of administering the anesthetic, defendants Yang and Wilson negligently and carelessly punctured and tore the membrane which protects the spinal cord causing internal leakage of cerebrospinal fluid. As a result of this injury, the complaint asserts, Betty M. Grossi has suffered severe physical and mental pain particularly when she assumes a sitting or standing position, and has been unable to perform normal activity. (Complaint, para. 7, page A-4) As a consequence, she has been unable to properly care for her children, Frank X. Grossi, III and Gina X. Grossi, who have thus been deprived of their mother's nursing, care, maintenance, education, love, affection and companionship. (Complaint, para. 8, page A-5)

ARGUMENT

I. CHILDREN EXISTING AND TO BE BORN HAVE A VALID ACTION IN CONTRACT FOR BREACH OF WARRANTY OF DUE PERFORMANCE IN THE DELIVERY OF A CHILD.

It has long been held that the relationship between

physician and patient may be of a contractual nature. *Napier v. Greensweig*, 256 F. 196, 197 (2d Cir., 1919). One who contracts to perform an expert service impliedly warrants that his service will be performed in a careful and prudent manner. *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124 at 133-134 (1955). Negligent or careless performance of the service gives rise to a breach of contract for foreseeable damages resulting from such negligence. *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563 (1958). The contractual duty of careful performance is owed not only to the parties to the contract, but to those for whom the service is to be performed. *Crumady v. The J. H. Fisser*, 358 U.S. 423 at 428 (1959). The cited cases relate to the duty owed to a vessel and her owner by a stevedore contractor. However, the Supreme Court's examination of contractual rights has application here where the contract for services is between patient and doctor for the delivery of a child and carries with it a similar warranty of careful and fit performance. The benefits of this contract flow not only to the mother and her husband, but to the child to be born.

Here plaintiff, Frank X. Grossi, Jr., contracted with defendant hospital and doctors for proper medical care

and services, and for the use of hospital facilities for his wife, Betty M. Grossi, and for his child to be born, Gina X. Grossi. Defendants agreed to furnish such medical care, services, and facilities in consideration of fees to be paid by Frank X. Grossi, Jr. It was the duty of the defendants in undertaking to provide treatment to Betty M. Grossi to exercise due care and skill of experts of the medical profession. Implied in such a contract is a warranty that no injurious consequences will result from want of proper skill, care, or diligence on the part of the medical experts. *Cayton v. English*, 57 App. D.C. 324, 23 F.2d 745 (1927); *Carr v. Shifflett*, 65 App. D.C. 268, 82 F.2d 874 (1936).

The defendants' alleged substandard performance and the resulting injury to Betty M. Grossi, as asserted in the complaint, constitute a valid cause of action for breach of the contract to provide proper medical care and services and a breach of the implied warranty that no injurious consequences would result from want of proper skill, care, or diligence on the part of the expert defendants. The plaintiff does not argue that the defendants insured or warranted the outcome of their treatment, but

asserts merely that the defendants warranted that the treatment would be performed in a careful and prudent manner commensurate with their skill as medical experts.

Where a contract is made principally for the benefit of a third party to whom performance is to be rendered, that party has an independent right in the performance of the contract. The great majority of jurisdictions, including the District of Columbia, permit a third party beneficiary of a contract to obtain judicial relief where there has been a breach of the contract. *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966); see *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959); *Swartz v. Brown*, 64 A.2d 298 (Mun. Ct. App. D.C. 1949); Restatement, Law of Contracts, §§133-136; 2 Williston, *Contracts* §356 (3d Ed. 1959). Here the contract was between Georgetown University Hospital and defendant physicians and plaintiff Frank X. Grossi, Jr., for the direct benefit of his wife, Betty M. Grossi, and her child to be born, Gina X. Grossi. Performance of the contract was to be rendered to them and for their benefit. Accordingly, Gina X. Grossi is a third party beneficiary to the contract

and entitled to recover for a breach of that contract and warranty.

Furthermore, expert medical treatment to a prospective mother is for the benefit and foreseeable interest of other existing children of the family. Consequently Frank X. Grossi, III, the older child, as well as Gina X. Grossi, the child delivered, is a third party beneficiary and entitled to recover for the breach of contract and warranty.

II. EXISTING CHILDREN AND CHILDREN TO BE BORN
SHOULD BE ENTITLED TO RECOVER IN TORT FOR WANT OF DUE CARE
IN THE DELIVERY OF A CHILD

Plaintiff recognizes that in the past the courts of the District of Columbia and elsewhere have not recognized the claim of a child for damages which resulted from a negligent injury to a parent by a third party. *Pleasant v. Washington Sand & Gravel Co.*, 104 App. D.C. 374, 262 F.2d 471 (1958); *Hill v. Sibley Memorial Hospital*, 108 F. Supp. 739 (1952). "However, it is well established that the mere absence of precedent does not prove that an action cannot be maintained." *Hill v. Sibley Memorial Hospital*, *supra*, at 740; *Daily v. Parker*, 152 F.2d 174 (7th Cir., 1945); *Morrow v. Yannantuono*, 152 Misc. 138, 273 N.Y.S. 912 (1934). As we have previously urged, the children have a valid action

in contract. However, we argue here that the children should have an independent cause of action in tort and that the Court should reconsider the rule of this jurisdiction which denies to children adequate compensation for the loss of a parent's comfort, aid, kindness, guidance, nurture, love, affection, and companionship, even where there is no contractual relationship between the injured party and the tortfeasor. Where a wrong has been suffered, the law should provide a remedy.

In 1950 the United States Court of Appeals for the District of Columbia Circuit in *Hitafter v. Argonne Co.*, 87 App. D.C. 57, 183 F.2d 811, *cert. denied*, 340 U.S. 852, (1950), made the District of Columbia the first jurisdiction in the United States to permit a wife, as well as a husband, to recover for loss of *consortium* resulting from negligent injury to her husband. Numerous jurisdictions have followed this result and today there is a decided trend toward allowing a wife to recover for her loss of *consortium*. Prosser, *The Law of Torts*, at 918-919 (3rd ed. 1964); see e.g., *Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881 (1960); *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); *Yonner v. Adams*, 3 Storey, Del. 229, 167 A.2d 717 (1961).

Consortium includes material services, love, affection, companionship, and sexual relations. *Hitafter v. Argonne Co.*, *supra*. Thus, a claim for loss of consortium is in many respects similar to the claim asserted on behalf of Frank X. Grossi, III and Gina X. Grossi for their loss of nursing, care, comfort, education, love, affection, companionship, and maintenance. Since the loss suffered by the children in this case is analogous to a loss of *consortium* suffered by a spouse, the children should be permitted to recover just as a spouse is entitled to recover in this jurisdiction.

The facts now before this Court present a particularly strong case for granting the children the opportunity to present their claims. The relationship of physician and patient is consensual. *Hankerson v. Thomas*, 148 A.2d 583 (Mun. Ct. App. D.C. 1959). Here the defendants voluntarily placed themselves in a position in which they could have foreseen serious consequences to the patient's children from negligence in the treatment of the mother. Moreover, the youth of the children, a new-born infant and a four year old, make the loss of their mother's nursing, care, maintenance, education, guidance, love, affection and companionship a particularly serious deprivation.

Several authorities have expressed agreement with the position taken by plaintiff-appellant in this case. "It is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother through the defendant's negligence. This is surely a genuine injury, and a serious one...." Prosser, *supra* at 919. Although this Court in *Hill v. Sibley Memorial Hospital, supra*, denied recovery to children for loss of the affection, aid and comfort of a parent due to negligence of a third party, it stated:

Nor does the court feel that it is always necessary for it to wait for legislative sanction before entertaining an action for which there is no judicial sanction. The common law should continually be reappraised and reinterpreted to meet changing circumstances. This court confesses that it has been difficult for it on the basis of natural justice to reach the conclusion that this type of an action will not lie. When a child loses the love and companionship of a parent it is deprived of something that is indeed valuable and precious. Courts should ever be alert to widen the circle of justice to conform to the changing needs and conditions of society.

In the seventeen intervening years since the *Hill* case, changing social conditions and needs make this precedent ripe for reversal.

CONCLUSION

For the foregoing reasons, plaintiff-appellant Frank X. Grossi, Jr., prays that this Court reverse the order and decision of the United States District Court for the District of Columbia Circuit denying recovery for foreseeable damages to children for breach of warranty of due care and negligence to their mother. Plaintiff-appellant further prays that this case be remanded for further proceedings.

Respectfully submitted,

/s/ Alan Raywid

Alan Raywid
Attorney for Appellant
Frank X. Grossi, Jr. on
behalf of and as next friend
of Frank X. Grossi, III, and
Gina X. Grossi.

CONTENTS OF APPENDIX

	<u>Page</u>
COMPLAINT FOR DAMAGES	A-2
MOTION TO DISMISS	A-7
ORDER	A-7
PAGES 7-8 OF TRANSCRIPT	A-8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANK X. GROSSI, JR., on behalf of)
and as next friend of)
FRANK X. GROSSI, III, and)
GINA X. GROSSI)
4507 South 36th Street)
Arlington, Virginia)

Plaintiffs,)

v.)

PRESIDENT AND DIRECTORS OF)
GEORGETOWN COLLEGE, a corporation)
37th & O Streets, N. W.)
Washington, D. C.)

and)

JIEH CHYOU YANG, M.D.)
Georgetown University Hospital)
3800 Reservoir Road, N. W.)
Washington, D. C.)

and)

JOSEPH R. WILSON, M.D.)
Georgetown University Hospital)
3800 Reservoir Road, N. W.)
Washington, D. C.)

and)

JOHN W. WALSH, M. D.)
1835 Eye Street, N. W.)
Washington, D. C.)

Defendants)

Civil Action No.
1672-69

COMPLAINT FOR DAMAGES

1. Plaintiffs, Frank X. Grossi, III, and Gina X. Grossi, minor children of Frank X. Grossi, Jr., and Betty M. Grossi, are citizens of the State of Virginia and bring this action through their next friend Frank X. Grossi, Jr. The amount in controversy exceeds Ten Thousand Dollars (\$10,000.00) exclusive of interest and costs as more fully appears hereafter.

[P. 2]

2. Defendant, President and Directors of Georgetown College, is a corporation incorporated under an act of Congress and having its principal place of business in the District of Columbia. Defendants Jieh Chyou Yang, M.D., and Joseph R. Wilson, M.D., are individuals practicing medicine in the employment of defendant corporation. Defendant John W. Walsh, M.D., is an individual practicing medicine within the District of Columbia and residing within the District of Columbia.

3. On August 7, 1968, plaintiff's mother, Betty M. Grossi, was admitted to the Georgetown University Hospital, owned and operated by defendant corporation, to undergo the routine delivery of a baby after a normal gestation, such delivery to be compensated for by plaintiffs' parents, Betty M. Grossi and Frank X. Grossi, Jr.

4. As a condition of hospitalizing and undertaking to furnish services in connection with the delivery of the baby, defendant corporation warranted, both expressly and impliedly, to perform its services in a professional and workmanlike manner, so as not to visit harm or injury upon plaintiffs or their mother.

5. Defendants Jieh Chyou Yang, M.D., Joseph R. Wilson, M.D. and John W. Walsh, M.D., as a condition of performing or assisting in the delivery of the baby, did warrant, both expressly and impliedly, to perform their services in a workmanlike and professional manner so as not to visit harm or injury upon plaintiffs or their mother.

6. In the pre-delivery preparation a local anesthetic was prescribed by defendant John W. Walsh, M.D. This anesthetic known as an epidural or extradural, was administered by anesthesiologists defendants Jieh Chyou Yang, M.D., and Joseph R. Wilson, M.D., who were employed by and who were under the supervision

[P. 3]

and control of defendant corporation. In the course of administering the anesthetic, defendants Jieh Chyou Yang, M.D., and Joseph R. Wilson, M.D., negligently

and carelessly, in breach of their warranty of professional and workmanlike service, did puncture and tear the membrane which protects the spinal cord causing the internal leakage of cerebrospinal fluid by the plaintiffs' mother.

7. As a result of the negligence and breach of warranty of the defendant corporation, acting through its employee anesthetists, and as a direct result of the negligence and breach of warranty of the attending obstetrician, defendant Walsh, plaintiffs' mother was caused to experience and continues to experience the internal drainage of cerebrospinal fluid which has further caused and continues to cause plaintiffs' mother to suffer severe and recurrent headaches whenever she assumes the sitting or standing position. In order to alleviate this great physical and mental pain, plaintiffs' mother has continually been required to remain in the prone position and is unable to perform any normal activity, including the proper care of her family.

8. Prior to the infliction of the aforesaid injuries, Betty M. Grossi had been a pleasing and loving mother to Frank X. Grossi, III. As a result of the aforesaid injuries to their mother, plaintiffs'

comfort and happiness in her society has been greatly impaired and, as a further result of the aforesaid injuries to their mother, plaintiffs have been deprived of their

[P. 4]

mother's nursing, care, maintenance, education, love, affection and companionship. Said deprivations have persisted for a long time and will continue for a long time to come. By reason of said injuries, Betty M. Grossi has become highly nervous and irritable to the plaintiffs.

WHEREFORE, plaintiffs demand judgement from defendants, jointly and severally, as follows:

1. Plaintiff Frank X. Grossi, III, demands judgement in the sum of Twenty-Five Thousand Dollars (\$25,000.00) and costs, and such other relief as this Court deems proper.

A - 6

2. Plaintiff Gina X. Grossi demands judgement in the sum of Twenty-Five Thousand Dollars (\$25,000.00) and costs, and such other relief as this Court deems proper.

COLE, ZYLSTRA & RAYWID

By: _____

Alan Raywid
Attorney for Plaintiffs
2011 Eye Street, N. W.
Washington, D. C. 20006
659-9750

[CAPTION OMITTED]

MOTION TO DISMISS

The defendants, President and Directors of Georgetown College, a corporation, Jieh Chyou Yang, M.D. and Joseph R. Wilson, M.D., by their attorneys, Jackson, Gray & Laskey, move the Court to dismiss the Complaint and for grounds say the Complaint fails to state a claim against these defendants upon which relief can be granted.

JACKSON, GRAY & LASKEY

By: _____

John L. Laskey
1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for Defendants
1, 2, & 3

[CAPTION OMITTED]

ORDER

Upon consideration of the Motion to Dismiss for failure to state a claim upon which relief can be granted filed on behalf of defendants, President and Directors of Georgetown College, a corporation, Jieh Chyou Yang, M.D. and Joseph R. Wilson, M.D., by their attorneys, and

the Court having heard the argument of counsel and being fully advised, it is this eighth day of September, 1969

ORDERED that the defendants' Motion be granted and the Complaint be and it is hereby dismissed.

John A. Pratt
Judge

[P. 7 of Transcript]

THE COURT: With respect to the matter of this being in the nature of a contract action for children suing as third party beneficiaries, in the first place, there is nothing in the conventional third party contract situation, first established in New York many years ago under *Lawrence v. Fox*, which involved so-called third party beneficiaries, that would permit children under these circumstances to take advantage of the contract by their father with a particular hospital.

Furthermore, *Cayton v. English*, 57 U. S. App. D. C. 324, 23 F.2d 745 (1936), was a case in negligence involving the failure of a hospital or doctor to provide

adequate care or professional services. The court's statement in that case concerning an implied agreement related to the alleged negligence and not to a separate theory of liability.

In short, the recovery of children under the theory of being third party beneficiaries, with the exception of two or three jurisdictions, has never been permitted, and has never been permitted here.

With respect to the matter of the children proceeding in tort, the Court will concede the logic of the plaintiff's argument with respect to the association of analogy.

On the other hand, we are faced by *Pleasant v. Washington Sand & Gravel Company*, 104 U. S. App. D. C. 374,

[P. 8 of Transcript]

262 F.2d 471 (1958), to mention only one case; and the state of the law in this jurisdiction is definitely to the contrary, as counsel admits in his moving papers. This is probably a matter for the legislature, and I would suggest that that is the place where the remedy would lie.

For all of the foregoing reasons, I am going to grant the motion to dismiss.

(Whereupon, the hearing was concluded.)

CERTIFICATE OF SERVICE

I, Alan Raywid, hereby certify that a copy of the foregoing "Brief for Appellant" was mailed, postage prepaid, this 24th day of December, 1969, to John L. Laskey, Esq., 1701 K Street, N. W., Washington, D. C. 20006, attorney for the appellee, and to John W. Walsh, M.D., 1835 Eye Street, N. W., Washington, D. C.

/s/

Alan Raywid

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BRIEF FOR APPELLEES

United States Court of Appeals
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FILED FEB 18 1970

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Wilson, M.D.*

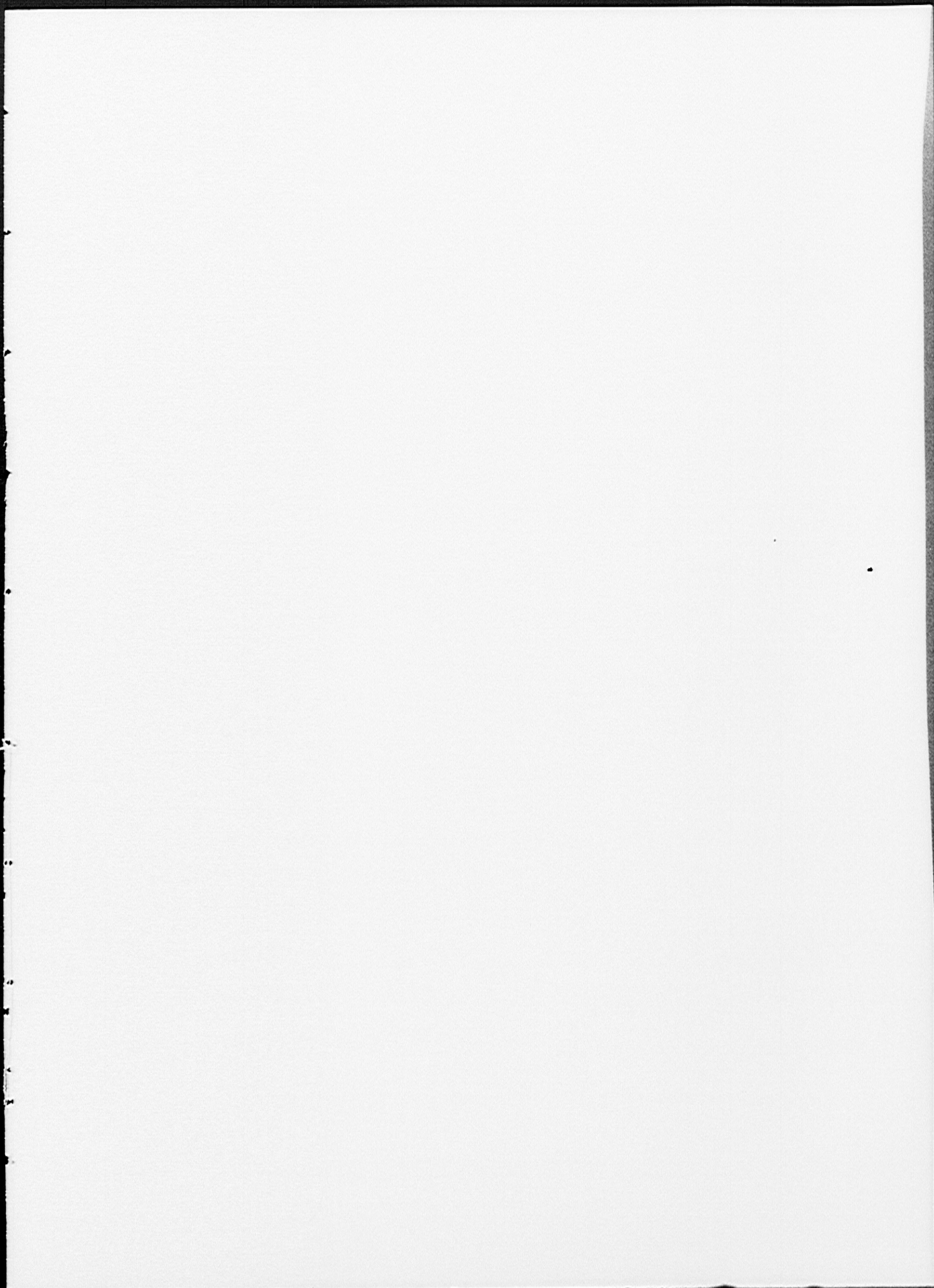


TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I The court did not err in its finding that under the law of the District of Columbia there is no cause of action against a third party by a child for an alleged negligent injury to a parent	3
II The court was correct in its statement that the facts of the instant case were not such as to give rise to a cause of action for the children as third-party beneficiaries under the law of contracts	6
CONCLUSION	9

TABLE OF CITATIONS

Cases:

Benson v. Mays, 245 Md. 637, 227 A.2d 220	7, 8
Breaux v. Aetna Casualty & Surety Co., 272 F. Supp. 668 (1967)	9
Carr v. Shifflett, 65 App. D.C. 324	9
Cayton v. English, 57 App. D.C. 324, 23 F.2d 745 (1936)	9
Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627	8
Dashiell v. Griffith, 84 Md. 363, 35 A. 1094 (1896)	7
Gibson v. Johnson, 75 Ohio Abs. 413, 144 N.E. 2d 310, app. dismissed 166 Ohio St. 288, 141 N.E. 2d 767 (1956)	5
Hill v. Sibley Memorial Hospital, 108 F. Supp. 739, 740 (1952)	3, 4
Harding v. Liberty Hospital Corporation, 177 Cal. 520, 171 P. 98 (Calif. 1918)	8
Hitafter v. Argonne Company, 87 U.S. App. D.C. 57, 183 F.2d 811, cert. denied, 340 U.S. 852 (1950)	4
Hoffman v. Dantel, 189 Kan. 165, 368 P.2d 57 (1962)	5
Holberg v. Young, 41 Hawaii 634, 59 ALR 2d. 445 (1957)	5
Kozan v. Comstock, 270 F.2d 839, 80 ALR 2d. 310 (1959)	8, 9

(ii)

Lane v. Calvert, 215 Md. 457, 138 A.2d 902 (1958)	7
Morfessis v. Baum, 108 U.S. App. D.C. 303, 281 F.2d 938 (1960)	8
Noel v. Proud, 367 P.2d 61, (Sup. Ct. Kan., 1961) rehrgr. denied 1962	7
*Pleasant v. Washington Sand & Gravel Co., 104 U.S. App. D.C. 374, 262 F.2d 471 (1958)	4
Seanor v. Browne, 154 Okla. 222, 7 P.2d 627 (1932)	8
Suburban Hospital Association v. Mewhinney, 230 Md. 480, 187 A.2d 671 (1963)	7
Swankowski v. Diethelim, 98 Ohio App. 271, 129 N.E. 2d 182 (1953)	8
Travis v. Bishoff, 143 Kan. 283, 54 P.2d 955 (1936)	8
Yoshizaki v. Hilo Hospital, 50 Hawaii 1, 427 P.2d 845, reh. gr. 50 Hawaii 40, 429 P.2d 829, op on reh. 433 P.2d 220	9
<i>Statutes:</i>	
41 Am. Jur., Physicians & Surgeons, Sec. 120	8
70 C.J.S., Physicians & Surgeons, Sec. 57	8
Prosser, Law of Torts (3rd Ed. 1969)	8

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BRIEF FOR APPELLEES

STATEMENT OF ISSUES PRESENTED

1. Whether the law recognizes the existence of a cause of action in favor of a child against a third party for an alleged tortious injury to its parent, especially where the said parent has an action based upon the same alleged negligent injury.
2. Whether a cause of action arising from an alleged malpractice of the defendant physicians and hospital, in the absence of an express contract or warranties by said defendants, can be labelled as

an action sounding in contract rather than in tort so that a claim could be said to arise in favor of an incidental third party beneficiary of said contract.

COUNTER-STATEMENT OF THE CASE

Betty M. Grossi was admitted to Georgetown University Hospital on August 7, 1968, for the delivery of a child. Gina X. Grossi, a plaintiff herein. During the delivery at the direction of her attending physician, John W. Walsh, M.D., she was given an epidural anesthesia by the defendant anesthesiologists, Jieh Chyou Yang, M.D. and Joseph R. Wilson, M.D. The delivery itself proceeded in a routine fashion and resulted in the delivery of a normal infant. There is no claim of injury to said infant.

After the delivery, Betty M. Grossi developed headaches which she claims are the result of the administration of the epidural anesthesia in a negligent fashion. She has filed a lawsuit on her own behalf for the alleged negligent injury and her husband, Frank X. Grossi, Jr., has filed a separate action for loss of consortium and her services.

The gravamen of the complaint in the instant action is for damages alleged to have been suffered by the two children of Betty M. Grossi as a result of the injury to her. As stated in paragraph 8 of the Complaint:

"8. Prior to the infliction of the aforesaid injuries, Betty M. Grossi had been a pleasing and a loving mother to Frank X. Grossi, III. As a result of the aforesaid injuries to their mother, plaintiffs' comfort and happiness in her society has been greatly impaired and, as a further result of the aforesaid injuries to their mother, plaintiffs have been deprived of their mother's nursing care, maintenance, education,

love, affection and companionship. Said deprivations have persisted for a long time and will continue for a long time to come. By reason of said injuries, Betty M. Grossi has become highly nervous and irritable to the plaintiffs."

SUMMARY OF ARGUMENT

1. The Court did not err in its finding that under the law of the District of Columbia there is no cause of action against a third party by a child for an alleged negligent injury to a parent.
2. The Court was correct in its statement that the facts of the instant case were not such as to give rise to a cause of action for the children as third-party beneficiaries under the law of contracts.

ARGUMENT

I

THE COURT DID NOT ERR IN ITS FINDING THAT UNDER THE LAW OF THE DISTRICT OF COLUMBIA THERE IS NO CAUSE OF ACTION AGAINST A THIRD PARTY BY A CHILD FOR AN ALLEGED NEGLIGENT INJURY TO A PARENT.

The appellant in the instant case is seeking, through this appeal, a change in the decisional law of the District of Columbia. He recognizes that such a claim has not been recognized heretofore in the District of Columbia or elsewhere, but taking a statement from *Hill v. Sibley Memorial Hospital*, 108 F. Supp. 739, 740 (1952), that "the mere absence of a precedent does not prove that an action cannot be maintained," he argues that the District of Columbia jurisdiction which was one of the first to permit a wife to recover for loss of consortium should also be the first to recognize an analogous right for the children.

The plaintiff fails to take fully into account the case of *Pleasant v. Washington Sand & Gravel Company*, 104 U.S. App. D.C. 374, 262 F.2d 471 (1958), which was decided six years after *Hill v. Sibley* and eight years after *Hitafter v. Argonne Company*, 87 U.S. App. D.C. 57, 183 F.2d 811, cert. denied, 340 U.S. 852 (1950), which first recognized the right of a wife to recover for loss of consortium. The appellants in the *Pleasant v. Washington Sand & Gravel* case relied upon the *Hitafter* case and analogized the claim of the child to the claim of a wife for loss of consortium. This Court affirmed the lower court's dismissal of the child's cause of action and said:

"At this stage, if a change is to be made in the pattern of liability along the lines appellant urges, the change should be made by Congress, which would weigh the merits of the proposed change against the other considerations—such as double recovery, increased litigation, and the like—which might be urged against it." *Pleasant v. Washington Sand & Gravel Co.*, 104 U.S. App. D.C. 374, 376, 262 F.2d 471 (1958).

In a very similar case from another jurisdiction, the Supreme Court of Kansas held that a minor child had no cause of action for damages arising out of the disability of its father, caused by the negligence of the defendant, with attendant loss of acts of parental guidance, love, society, companionship and other incidences of the parent-child relationship.

"While the courts should be ever alert to widen the circle of justice, at the same time they should proceed with caution in laying down a new rule in the light of conditions affected or to be affected by it. If this Court were to conclude that a cause of action is here alleged, the far-reaching results of such

a decision would be readily apparent. A new field of litigation would thus arise between minor children and third-party tortfeasors who injure either parent when it is alleged that the negligent injury contributed to the impairment or destruction of the happy family unit with resulting loss and damage to the minor children. The possibility of multiplicity of actions based upon a single tort and one physical injury, when there is added the double-recovery aspect of such a situation in the absence of some statutory control, is deemed sufficient to prevent this Court from answering in the affirmative that a cause of action has been alleged. The District Court did not err in sustaining the motion to strike paragraphs 7, 8 & 9 from the petition." *Hoffman v. Dantel*, (1962) 189 Kan. 165, 368 P.2d 57, 59-60.

See also *Gibson v. Johnson* (Ohio App. 1956) 75 Ohio Abs. 413, 144 N.E. 2d 310, app. dismissed 166 Ohio St. 288, 141 N.E. 2d 767.

The same arguments were raised and considered in the case of *Holberg v. Young*, 41 Hawaii 634, 59 ALR 2d 445 (1957), and there the court pointed out that where the injuries do not result in death and parent can recover the full damages which he has sustained, including the inability to properly care for his children and that juries as a matter of fact do consider the plight of young children in fixing the amount of damages where the mother is so seriously injured as to be unable to give them care and attention.

In denying the existence of a cause of action on behalf of minor children in that case, the court said that if such recovery were allowed, it is obvious that each minor child would have a distinct and separate cause of action and there would be in many accident cases litigation almost without end, based upon a single tort and one physical injury.

II

THE COURT WAS CORRECT IN ITS STATEMENT THAT
THE FACTS OF THE INSTANT CASE WERE NOT SUCH
AS TO GIVE RISE TO A CAUSE OF ACTION FOR THE
CHILDREN AS THIRD-PARTY BENEFICIARIES UNDER
THE LAW OF CONTRACTS

The appellees assert and the appellant agrees (Brief for Appellant, p. 6-7) that the defendant physicians and hospital neither made an express contract with the plaintiffs, nor did they warrant or insure the outcome of their treatment. The plaintiff attempts to base his claim for breach of contract upon an implied contract said to arise between physician and patient because of the nature of the relationship. As he says on page 6 of his Brief:

"... It was the duty of the defendants in undertaking to provide treatment to Betty M. Grossi to exercise due care and skill of experts of the medical profession. Implied in such a contract is a warranty that no injurious consequences will result from want of proper skill, care or diligence on the part of the medical experts. (Citations omitted)

The defendants alleged substandard performance and the resulting injury to Betty M. Grossi, as asserted in the complaint, constitute a valid cause of action for breach of contract to provide proper medical care and services and a breach of the implied warranty that no injurious consequences would result from want of proper skill, care or diligence on the part of the expert defendants"

The sum and substance of plaintiff's allegations against the defendants, therefore, is that they failed to meet the requisite standards of care and skill prevailing in the community, not that they

made a special contract for a specific result or expressly warranted the outcome of treatment. Such allegations constitute a claim of malpractice and sound in tort and not in contract.

"The improper performance by a physician or surgeon of the duties imposed upon him by reason of the professional services undertaken, whether under a contractual relationship with the patient arising out of either an express or implied contract of employment or the obligation imposed by law under a consensual relationship, whereby the patient is injured in body and health for which he seeks damages, is malpractice. It has thus been said that an action for damages for malpractice is one in tort, even though there was a contract, an implied contract of employment."

Noel v. Proud, 367 P.2d 61, 66 (Sup. Ct. Kan., 1961), rehrg. denied 1962.

To the same effect in the case of *Benson v. Mays*, 245 Md. 637, 227 A.2d 220, where the Maryland Court of Appeals held that the gist or gravamen of a cause of action against defendant doctors and hospital for alleged negligent acts and omissions sounded in tort so that venue could be established only by considering the suit as an action *ex delicto*, and not *ex contractu*, notwithstanding inclusion of warranty counts in the Declaration. The Court in that case said:

"While it may be as appellant argues that a physician impliedly contracts with those who employ him that he possesses and will exercise a reasonable degree of care, skill and learning, *Dashiell v. Griffith*, 84 Md. 363, 35 A. 1094 (1896), malpractice is predicted upon the failure to exercise requisite medical skill and being tortious in nature, general rules of negligence usually apply in determining liability. *Suburban Hospital Association v. Mewhinney*, 230 Md. 480, 187 A.2d 671 (1963); *Lane v. Calvert*, 215 Md. 457, 138 A.2d 902 (1958). Louisell and Williams in

their work "Trial of Medical Malpractice Cases," state at p. 199 that most cases today charging lack of requisite skill and care are conceived and treated as tort actions for negligence and that 'the courts in suits against physicians regard negligence as the gist of the action, whatever the phraseology of the pleadings.' The great majority of courts that have considered the question have concluded that medical malpractice actions sound in tort and not in contract. See 41 Am. Jur., Physicians and Surgeons, Sec. 120; 70 CJS, Physicians & Surgeons § 57, Prosser on Torts, 3rd Ed. p. 634. . ." *Benson v. Mays*, *supra*, 223.

See also: *Harding v. Liberty Hospital Corporation*, 177 Cal. 520, 171 P 98 (Calif. 1918); *Travis v. Bishoff*, 143 Kan. 283, 54 P.2d 955 (Kan. 1936); *Swankowski v. Diethelim*, 98 Ohio App. 271, 129 N.E. 2d 182 (Ohio 1953); *Seanor v. Browne*, 154 Okla. 222, 7 P.2d 627 (1932).

The nature rather than the form of an action is controlling. *Cloutier v. Kasheta*, 105 N.H. 262, 197 A.2d 627, and the nature of a cause of action is not changed by changing the name given to it, *Morfessis v. Baum*, (1960) 108 U.S. App. D.C. 303.

In the case of *Kozan v. Comstock*, 270 F.2d 839, 80 ALR 2d 310 (1959), where the question arose as to whether the one-year Statute of Limitations for malpractice or the ten-year Statute of Limitations for contracts applied to a suit brought against a physician, the U.S. Court of Appeals for the 5th Circuit in deciding that the one-year malpractice statute applied, thus barring the action, said:

"We do not mean to say that there can never be a contractual action against a physician. Generally a physician undertakes only to utilize his best skill and judgment. When he negligently fails to do so he may

have committed a tort. However, a physician may, by express contract, agree to effect a cure or warrant that a particular result will be obtained. In such instances an action in contract may lie against a physician. However, in the absence of a special warranty or contract, a malpractice suit against a physician is an action in tort and is subject to the limitations period for tort actions." *Kozan v. Comstock, supra*, 80 ALR 2d 310, 319.

See also: *Breaux v. Aetna Casualty and Surety Co.*, 272 F.S. 668 (1967); *Yoshizaki v. Hilo Hospital*, 50 Hawaii 1, 84, 427 P.2d 845, reh. gr. 50 Hawaii 40, 429 P.2d 829, op on reh. 433 P.2d 220.

The cases relied upon by appellant are not contra to this position. For example, Judge Pratt pointed out in his ruling on the Motion to Dismiss that a case which is one chiefly relied upon by appellant, *Cayton v. English*, 57 App. D.C. 324, 23 F.2d 745 (1927), deals only with the question of the implied agreement of a hospital or doctor to provide adequate care as it relates to an allegation of negligence, and does not reach the question of a separate theory of liability. (Brief for Appellant, Opinion of Court, A. 8-9) the case of *Carr v. Shifflett*, 65 App. D.C. 324, which is also cited by appellant, is to the same effect.

The court below, therefore, was correct in stating that under the facts of this case, the children of Betty M. Grossi do not have a cause of action as third-party beneficiaries under an implied contract.

CONCLUSION

The gravamen of the Complaint in this action is for damages claimed to have been sustained by two minor children because of an alleged negligent injury to their parent. The alleged injury is one said to have been caused by the malpractice of appellees and sounds

in tort rather than in contract. The law of the District of Columbia does not recognize the existence of the right of a minor child to recover from a third party for an alleged negligent injury to its parent. The Complaint, therefore, fails to state a cause of action upon which relief can be granted against the appellees.

Respectfully submitted,

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Wilson, M.D.*

Of Counsel:

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REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 23,643

RECEIVED

MAR 16 1970

CLERK OF THE UNITED STATES COURT

FRANK X. GROSSI, JR. ON
BEHALF OF AND AS NEXT
FRIEND OF FRANK X. GROSSI,
III, AND GINA X. GROSSI,

Appellant,

v.

PRESIDENT AND DIRECTORS OF
GEORGETOWN COLLEGE, A CORPORATION
JIEH CHYOU YANG, M.D.
JOSEPH R. WILSON, M.D.
JOHN W. WALSH, M.D.,

Appellees.

On Appeal from Decision and
Order of the United States
District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 20 1970

Nathan J. Fenderson
CLERK

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(i)

Table of Contents

	<u>Page</u>
ARGUMENT IN REPLY	1
CONCLUSION.	8

(ii)

Table of Citations

<u>Cases</u>	<u>Page</u>
Cooney v. Moomaw, 109 F. Supp. 448, (D. Neb. 1953)	4
Dini v. Naiditch, 20 Ill. 2d 406, 170 N. E. 2d 881 (1960)	3, 4
Ekalo v. Constructive Service Corp. of America, 46 N. J. 82, 215 A. 2d 1 (1965)	5
Hill v. Sibley Memorial Hospital, 108 F. Supp. 739 (1952)	8
Hitaffer v. Argonne Company, 87 U. S. App. D. C. 57, 183 F. 2d 811 <u>cert.</u> <u>denied</u> , 340 U. S. 852 (1952)	2, 4, 7
Hoekstra v. Helgelan, 78 S. D. 82, 98 N.W. 2d 669 (1959)	4, 7
Hoffman v. Dantel, 189 Kan. 165, 368 P. 2d 57 (1962)	2, 5
Holberg v. Young, 41 Hawaii 634, 59 ALR 2d 445 (1957)	2
Karczewski v. Baltimore and Ohio RR. Co., 274 F. Supp. 169 (N. D. Ill. 1967)	3, 5
Montgomery v. Stephen, 359 Mich. 33, 101 N.W. 2d 227 (1960)	3
Neuberg v. Bobowicz, 193 Pa. Super., 118, 162 A. 2d 662 (1960)	3
Pleasant v. Washington Sand & Gravel Company, 104 App. D. C. 374, 262 F. 2d 471 (1958)	2
Yonner v. Adams, 3 Story, Del. 229, 167 A. 2d 717 (1961)	3

(iii)

Other Authorities

	<u>Page</u>
20 <u>Cornell Law Quarterly</u> 255 (1934)	6
Prosser, <u>The Law of Torts</u> , (3rd Ed. 1969)	3

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 23,643

Frank X. Grossi, Jr. on
behalf of and as next
friend of Frank X. Grossi,
III, and Gina X. Grossi,
Appellant

v.

President and Directors of
Georgetown College,
a corporation
Jieh Chyou Yang, M.D.
Joseph R. Wilson, M.D.
John W. Walsh, M.D.,
Appellees

ARGUMENT IN REPLY

The Arguments Raised By Appellant Do Not
Justify Denying The Existence Of A Cause of
Action On Behalf Of The Minor Children

Appellees assert and Appellant agrees that under
the law of the District of Columbia there is no cause of
action against a third party by a child for an alleged
negligent injury to a parent. Appellees rely on several
cases, all of which have denied recovery to the child of
an injured parent. *Pleasant v. Washington Sand & Gravel*

Company, 104 U.S. App. D.C. 374, 262 F.2d 471 (1958);
Hoffman v. Dantel, 189 Kan. 165, 368 P.2d 57 (1962); and
Holberg v. Young, 41 Hawaii 634, 59 ALR2d 445 (1957). The
cases upon which Appellees base their argument have pre-
vented recovery by the child, reasoning that to grant such
an award would increase the possibility of double recovery,
open a Pandora's box of increased litigation and be generally
unworkable without statutory control. But, it was these
same objections that this court overcame in *Hitafter v.*
Argonne Company, 87 U.S. App. D.C. 57, 183 F.2d 811, *cert.*
denied, 340 U.S. 852 (1950), in permitting a wife to
recover for loss of *consortium* resulting from negligent
injury to her husband.

The logic of the analogy between the claim of
the children and the claim of a wife for loss of *consortium*
was recognized by the trial court in this case [p. 7 of
Transcript, pp. A8-A9 of Appellants Brief] and has been
recognized by other courts as well. The Supreme Court of
Pennsylvania has stated "...that with few exceptions,
the arguments used on behalf of a married person in a
consortium suit against the negligent third party could
be argued with no less validity in actions against responsible
tort feasers brought by or on behalf of infant children of

the injured party." *Neuberg v. Bobowicz*, 193 Pa. Super. 118, 162 A.2d 662, 666-67 (1960). The strength of this analogy suggests that the reasons stated by Appellees for denying recovery to Appellant are not valid in light of the vast number of decisions which have granted relief to the wife of an injured husband. Prosser, *The Law of Torts*, 918-919 (3rd ed., 1964); see e.g., *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E. 2d 881 (1960); *Montgomery v. Stephen*, 359 Mich. 33, 101 N.W. 2d 227 (1960); *Yonner v. Adams*, 3 Story, Del. 229, 167 A.2d 717 (1961).

The fear of double recovery is unwarranted in this case. Appellant (plaintiff below) seeks adequate compensation for the loss of their mother's comfort, aid, kindness, guidance, nurture, love, affection and companionship. The children's interest therein does not overlap with that of their parents in seeking separate recovery from these same defendants. The damages suffered by Frank and Betty Grossi are independent of those suffered by their children and can be readily separated by this Court. In *Karczewski v. Baltimore & Ohio RR. Co.*, 274 F.Supp. 169, 173 (N.D. Ill. 1967), the court recognized that in situations similar to that presently before this Court

double recovery could easily be avoided by deducting from the parents' recovery any amount received which might represent damages to the children. This same logic was prominent in this Court's decision in *Hitafter, supra* at 819, rejecting the double recovery argument. And, the Supreme Court of Illinois, in granting relief under the *Hitafter* rationale to a wife for loss of *consortium* perceptively recognized that "[t]he 'double recovery' bogey is merely a convenient cliché for denying the wife's action for loss of consortium." *Dini v. Naiditch, supra* at 891.

Other means have been suggested for eliminating the possibility of double recovery. In *Cooney v. Moomaw*, 109 F.Supp. 448, 450-51 (D. Neb. 1953), the court indicated that double recovery can be prevented by "proper evidentiary rulings and instructions to the jury" that clearly state the elements of damages that are recoverable. And in *Hoekstra v. Helgelan*, 78 S.D. 82, 98 N.W. 2d 669, 683 (1959) the court stated that the "fear of double recovery may not be justified for under proper instructions and subject to review by the courts ... it may be eliminated or controlled." These courts have recognized the jury's ability to separate the elements of damages claimed, and reach a just conclusion under the guidance of the court.

If, despite court controls, the recovery is still deemed excessive, the court may exercise its power of *remittitur* to ensure that the child recovers only for the damage which he has actually suffered.

Appellees have argued that to grant the children a cause of action will lead to increased litigation and to a multiplicity of actions arising out of a single tort. The court in *Karczewski, supra* at 174, addressed itself to this argument in stating that "[t]he multiplicity argument succeeds only in lessening the number of lawsuits at the expense of barring redress for a legitimate interest ..."^{1/} In *Ekalo v. Constructive Service Corp. of America*, 46 N.J. 82, 215 A.2d 1 (1965), the Supreme Court of New Jersey balanced the policy considerations underlying the granting of just compensation to the wife against the possibility of increased litigation and concluded that the more persuasive argument was on the side of

^{1/}The legitimacy of this interest was clearly recognized by the Supreme Court of Kansas in a case heavily relied upon by Appellees, *Hoffman v. Dantel, supra* at 59, when it stated that when "the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise."

"expanding tort liability in the just effort to afford decent compensatory measure to those injured by the wrongful conduct of others. See *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 88 A.L.R. 2d 1313 (1960); *Duffy v. Bill*, 32 N.J. 278, 160 A.2d 822 (1960); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958)."

The concern over multiplicity of actions has not deterred the courts from granting recovery to the husband for loss of *consortium* attributable to injuries to his wife arising from defendant's negligent action. In such cases, the defendant is often subject to several actions based upon a single tort and one physical injury. The same rationale has supported a wife's recovery for loss of *consortium* resulting from her husband's injury. To allow the multiplicity objection to be raised has been categorized as "subterfuge", 20 *Cornell Law Quarterly* 255, 256 (1934). Rightful recovery should not be denied because of the mere possibility that the case may be relied upon by others when seeking similar relief. The courts have ample opportunity, upon consideration of each case on the merits, to prevent any ill-conceived suits

from reaching fruition.

In actuality the increase in litigation simply has not occurred. In *Hoekstra, supra* at 683, the court stated that since allowing the wife to recover for loss of consortium "we have seen no flood of litigation ... Rather there has been a paucity of them which may indicate a sobering effect on the wrongful actions they proscribe and penalize." The multiplicity argument should not prevent this Court from granting compensation for real and substantial injuries.

Appellees have also argued that it would be improper for this Court to recognize a cause of action as existing in the children. They suggest that recognition of such a right can only be by legislative mandate. Yet, this court in *Hitafter, supra*, recognized for the first time, without prior legislative authorization, the right of the wife to recover for loss of *consortium*. And, in *Hoekstra, supra* at 683, the court addressed itself to this very question and concluded that it was simply removing the cover from a present-day common law right of action, and that the only matter for the legislature would be the denial of this new cause of action -- not the allowance thereof.

CONCLUSION

Appellant brings before this Court injuries of a real and substantial nature. This Court has been responsible for expanding the class of individuals to whom recovery is to be afforded for loss of *consortium* resulting from injury to a family member. It is now in a position to "widen the circle of justice to conform to the changing needs and conditions of society." *Hill v. Sibley Memorial Hospital*, 108 F. Supp. 739, 740 (1952).

WHEREFORE, Appellant prays that this Court reverse the order and decision of the United States District Court for the District of Columbia denying relief for failure to state a claim upon which relief could be granted and remand this case for further proceedings.

Respectfully submitted,

/s/ Alan Raywid
Alan Raywid
Attorney for Appellant
Frank X. Grossi, Jr. on
behalf of and as next friend
of Frank X. Grossi, III, and
Gina X. Grossi.

CERTIFICATE OF SERVICE

I, Alan Raywid, hereby certify that a copy of the foregoing "Brief for Appellant" was mailed, postage prepaid, this 16th day of March, 1970, to John L. Laskey, Esq., 1701 K Street, N.W., Washington, D.C. 20006, attorney for the appellee.

/s/ Alan Raywid